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21 CORPORATION, INC. and J. C. PENNEY
22 COMPANY, INC.

23 UNITED STATES DISTRICT COURT
24 CENTRAL DISTRICT OF CALIFORNIA
25 EASTERN DIVISION

26 STEPHANIE GARRIDO and JAZMIN
27 SOLANO, as aggrieved employees
28 pursuant to the Private Attorneys
General Act ("PAGA"),

Plaintiffs,

v.

J. C. PENNEY CORPORATION, INC.,
a Delaware corporation; J. C. PENNEY
COMPANY, INC., a Delaware
corporation; and DOES 1 through 10,
inclusive,

Defendants.

CASE NO. 5:18-cv-02051

**DEFENDANTS' J. C. PENNEY
CORPORATION, INC.'S AND J. C.
PENNEY COMPANY, INC.'S
NOTICE OF REMOVAL OF CLASS
ACTION**

[*Removal from the Superior Court of
California, County of Riverside, Case No.
RIC 1714926*]

Action Filed: August 11, 2017

1 **TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 CENTRAL DISTRICT OF CALIFORNIA, PLAINTIFFS, AND THEIR
3 COUNSEL OF RECORD:**

4 **PLEASE TAKE NOTICE THAT**, pursuant to 28 U.S.C. §§ 1441, 1446, and
5 1453, and in accordance with 28 U.S.C. §§ 1332 and 1711, Defendants J. C. Penney
6 Corporation, Inc. and J. C. Penney Company, Inc. (collectively “Defendants”) hereby
7 remove the above-captioned state court action, originally filed as Case No. RIC
8 1714926 in the Superior Court for the State of California for the County of Riverside,
9 to the United States District Court for the Central District of California, Eastern
10 Division. Removal is proper on the grounds explained below.

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1 I. BACKGROUND

2 1. On August 11, 2017, named Plaintiffs Stephanie Garrido and Jazmin
3 Solano (collectively, “Plaintiffs”), filed a complaint in the Superior Court of
4 California, County of Riverside, styled as a Private Attorneys General Act (“PAGA”)
5 Enforcement Action. *See Declaration of Cathy A. Conway in Support of Defendants’*
6 *Notice of Removal (“Conway Decl.”) ¶ 2, Ex. A (“Complaint”). Plaintiff Garrido is a*
7 *former non-exempt Sales Associate who worked at the JCPenney store in Riverside,*
8 *California from approximately November 2015 to November 2016. Complaint ¶ 9.*
9 Plaintiff Solano is a former non-exempt Sales Associate who worked at the JCPenney
10 store in Downey, California from approximately November 2016 to February 2017.
11 *Id.* ¶ 10.

12 2. Plaintiffs’ Complaint sets forth two causes of action under PAGA (Cal.
13 Lab. Code §§ 2698, *et seq.*) alleging violations of Wage Order No. 7-2001, § 14(A)
14 and Wage Order No. 7-2001, § 14(B) (collectively, the “Suitable Seating
15 Regulations”). Complaint at 13–14. Plaintiffs alleged in the Complaint that JCPenney
16 violated Section 14(A) of the Suitable Seating Regulations because “Plaintiffs and
17 other non-party Aggrieved Employees were not allowed to sit, even when the nature of
18 their work would reasonably permit the use of seats, nor were they provided with
19 suitable seats.” *Id.* ¶ 43. Plaintiffs alleged that JCPenney violated Section 14(B) of the
20 Suitable Seating Regulations because “Defendants did not provide Plaintiffs and other
21 non-party Aggrieved Employees with seats or stools in reasonable proximity to their
22 work to allow them to use seats when it would not interfere with the performance of
23 their duties for times when they were not engaged in active duties that require
24 standing.” *Id.* ¶ 52.

25 3. In Plaintiffs’ Complaint, Plaintiffs sought PAGA penalties on behalf of
26 “non-exempt, hourly-paid sales associates, cashiers, or other employees assigned cash
27 register duties at a retail store location in California (excluding employees that worked
28 at JCPenney Store Nos. 0250, 1778, 2648, 2649, 2823, and/or 2937).” Complaint ¶ 2.

1 Plaintiffs' Complaint alleged that “[t]here is no basis for federal diversity jurisdiction
 2 in this action given that the State of California, as the real party in interest in this
 3 action, is not a ‘citizen’ for purposes of satisfying diversity jurisdiction.” *Id.* ¶ 5
 4 (*Urbino v. Orkin Services of Cal.*, 726 F.3d 1118, 1123 (9th Cir. 2013)). The
 5 Complaint also alleged that “civil penalties cannot be aggregated to satisfy the amount
 6 in controversy requirement for federal diversity jurisdiction in this action, and that
 7 diversity jurisdiction cannot be established when Plaintiffs’ share of the civil penalties
 8 attributable to violations personally suffered are less than \$75,000.” *Id.* (citing *Urbino*,
 9 726 F.3d at 1122).

10 4. On August 24, 2017, Plaintiffs served Defendants with a copy of the
 11 summons and Complaint. *See* Conway Decl. ¶¶ 2–4, Exs. A–C. On September 25,
 12 2017, JCPenney filed and served its Answer to Plaintiffs’ Complaint. Conway Decl.
 13 Ex. F.

14 5. On July 3, 2018, Plaintiffs filed a First Amended Complaint (“FAC”) to
 15 add salon stylists to the group of allegedly aggrieved employees they sought to
 16 represent. Conway Decl. ¶ 20, Ex. S (FAC), Ex. T, Ex. EE. In Plaintiffs’ FAC, styled
 17 as a PAGA Enforcement Action, Plaintiffs sought PAGA penalties on behalf of “non-
 18 exempt, hourly-paid sales associates, cashiers, or other employees assigned cash
 19 register duties, or Salon Stylists at a retail store location in California (excluding
 20 employees that worked at JCPenney Store Nos. 0250, 1778, 2648, 2649, 2823, and/or
 21 2937).” FAC ¶ 2. As Plaintiffs did in their Complaint, Plaintiffs alleged in their FAC
 22 that “[t]here is no basis for federal diversity jurisdiction in this action given that the
 23 State of California, as the real party in interest in this action, is not a ‘citizen’ for
 24 purposes of satisfying diversity jurisdiction.” *Id.* ¶ 5 (citing *Urbino*, 726 F.3d at
 25 1123.). Plaintiffs also alleged that “civil penalties cannot be aggregated to satisfy the
 26 amount in controversy requirement for federal diversity jurisdiction in this action, and
 27 that diversity jurisdiction cannot be established when Plaintiffs’ share of the civil
 28

1 penalties attributable to violations personally suffered are less than \$75,000.” *Id.*
 2 (citing *Urbino*, 726 F.3d at 1122.)

3 6. On September 11, 2018, Plaintiffs filed a Second Amended Complaint
 4 (“SAC”) styled as a “Class Action and Enforcement Under the California Labor Code
 5 Private Attorneys General Act §§ 2698 *et seq.*” Conway Decl. Ex W (SAC) at 1. For
 6 the first time in this litigation, Plaintiffs asserted class action allegations. SAC ¶¶ 2,
 7 27–32. According to the SAC, “Plaintiffs’ proposed class consists of and is defined as
 8 follows: All persons who were employed by Defendants in California as non-exempt,
 9 hourly-paid salon stylists, cashiers, sales associates, or other position assigned cashier
 10 duties at any time from August 1, 2016 in a California retail store location (excluding
 11 employees that worked at JCPenney Store Nos. 0250, 1778, 2648, 2649, 2823, and/or
 12 2937).” SAC ¶ 29.

13 7. Plaintiffs served Defendants with the SAC on September 11, 2018.
 14 Conway Decl. Exs. V–W, EE. On September 20, 2018, Defendants answered
 15 Plaintiffs’ SAC. Conway Decl. Ex. AA.

16 8. As set forth more fully below, this Court has jurisdiction over this matter
 17 and it is properly removed pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, as the
 18 allegations in Plaintiffs’ SAC identify a putative class of more than 100 members and
 19 put in controversy, in the aggregate, an amount that exceeds \$5 million. *See* 28 U.S.C.
 20 § 1332(d)(6) (providing that claims of individual class members are “aggregated to
 21 determine whether the matter in controversy exceeds the sum or value of \$5,000,000”).

22 **II. REMOVAL IS TIMELY**

23 9. Plaintiffs’ Complaint and First Amended Complaint pleaded only PAGA
 24 claims against Defendants. Consistent with applicable federal law, the allegations in
 25 Plaintiffs’ Complaint and First Amended Complaint did not provide a basis for federal
 26 jurisdiction. *See Yocupicio v. PAE Group, LLC*, 795 F.3d 1057, 1060 (9th Cir. 2015)
 27 (PAGA is not a class claim for purposes of federal jurisdiction under the Class Action
 28 Fairness Act of 2005); *id.* 1060 n.7 (“[T]he fact that Yocupicio did not seek class status

1 for that [PAGA] claim is ‘fatal to CAFA jurisdiction’ over it”) (quoting *Haw ex rel.*
 2 *Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014)); *Urbino*, 726
 3 F.3d at 1122 (PAGA penalties cannot be aggregated to meet the \$75,000 amount in
 4 controversy requirement for diversity jurisdiction); *see also* Complaint ¶ 5 (alleging
 5 Plaintiffs’ individual shares of PAGA penalties is less than \$75,000); FAC ¶ 5 (same).

6 10. On September 11, 2018, Plaintiffs served their Second Amended
 7 Complaint that asserted, for the first time in this case, class claims against Defendants
 8 that include their PAGA claims, and allegations supporting this Court having subject
 9 matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005
 10 (“CAFA”), 28 U.S.C. § 1332(d). SAC ¶¶ 2, 27–32; Conway Decl. Exs. V–W, EE.
 11 This notice of removal is therefore timely pursuant to 28 U.S.C. § 1446(b)(3) because
 12 it is filed within 30 days after service of “an amended pleading . . . from which it [was]
 13 first ascertained that the case is one which is or has become removable.” 28 U.S.C. §
 14 1446(b)(3); *see Diaz v. A&R Logistics, Inc.*, No. 15cv0520 DMS (RBB), 2015 WL
 15 3464450, at *4 (S.D. Cal. May 29, 2015) (“What matters under CAFA is that Plaintiff
 16 has proposed a class which includes his PAGA claims. Having so alleged, the PAGA
 17 claims are claims of the proposed class members, and, as such, they are aggregated to
 18 determine the amount in controversy.”).

19 **III. SUMMARY OF PLAINTIFFS’ ALLEGATIONS AND GROUNDS FOR 20 REMOVAL**

21 11. Removal is proper pursuant to 28 U.S.C. §§ 1441 and 1453 because this
 22 Court has subject matter jurisdiction over this action and all claims asserted against
 23 Defendants pursuant to CAFA.

24 12. CAFA applies “to any class action before or after the entry of a class
 25 certification order by the court with respect to that action.” 28 U.S.C. § 1332(d)(8).
 26 This case is a putative “class action” under CAFA because it was brought under a state
 27 statute or rule, namely California Code of Civil Procedure § 382, authorizing an action

1 to be brought by one or more representative persons as a class action. *See* 28 U.S.C.
 2 § 1332(d)(1)(B); *see also* SAC ¶¶ 2, 27–32.

3 13. Plaintiffs allege in the SAC that, *inter alia*, “this is a class action brought
 4 pursuant to California Code of Civil Procedure section 382 and enforcement action
 5 under the Labor Code Private Attorneys General Act of 2004 California Labor Code
 6 section 2698 *et seq.* [] to recover civil penalties” and “Plaintiffs’ proposed class
 7 consists of and is defined as follows: All persons who were employed by Defendants
 8 in California as non-exempt, hourly-paid salon stylists, cashiers, sales associates, or
 9 other position assigned cashier duties at any time from August 1, 2016 in a California
 10 retail store location (excluding employees that worked at JCPenney Store Nos. 0250,
 11 1778, 2648, 2649, 2823, and/or 2937).” SAC ¶¶ 2, 29.

12 14. Plaintiffs allege, on behalf of themselves and all putative class members,
 13 three causes of action: (1) violation of California Labor Code § 1198, Wage Order No.
 14 7-2001, Section 14(A); (2) violation of California Labor Code § 1198, Wage Order
 15 No. 7-2001 Section 14(B), and (3) violation of California Business & Professions
 16 Code §§ 17200. SAC ¶¶ 45–65. Plaintiffs also assert, on behalf of themselves, the
 17 State of California, and the allegedly aggrieved employees, two causes of action under
 18 PAGA: (1) violation of California Labor Code § 1198, Wage Order No. 7-2001,
 19 Section 14(A); and (2) violation of California Labor Code § 1198, Wage Order No. 7-
 20 2001 Section 14(B). SAC ¶¶ 66–82.

21 15. Plaintiffs’ seek “civil penalties, restitution, and attorneys’ fees in excess
 22 of five million (\$5,000,000) to the State of California and aggrieved employees.” SAC
 23 ¶ 83.

24 16. Under CAFA, federal courts have original jurisdiction over class actions
 25 where the amount in controversy exceeds \$5 million in the aggregate for the entire
 26 class, exclusive of interest and costs; the putative class action contains at least 100
 27 members; and any member of the putative class is a citizen of a state different from
 28 that of any defendant. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B), and (d)(6).

1 17. Defendants deny any liability as to Plaintiffs' individual claims and as to
 2 the claims of the putative class members and allegedly aggrieved employees Plaintiffs
 3 purport to represent. Defendants expressly reserve all of its rights, including, but not
 4 limited to, its right to file motions to compel arbitration and motions challenging the
 5 pleadings. However, for purposes of meeting the jurisdictional requirements for
 6 removal *only*, Defendants submit on a good-faith basis that this action satisfies all
 7 requirements for federal jurisdiction under CAFA because, as set forth below, the
 8 allegations in the SAC identify a putative class of more than 100 members, establish
 9 the minimum diversity of citizenship required under CAFA, and put in controversy
 10 more than \$5 million in the aggregate for the entire class, exclusive of interest and
 11 costs.¹ *See* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B), and (d)(6).

12 **A. The Putative Class Consists of More Than 100 Members**

13 18. Plaintiffs' putative class encompasses "[a]ll persons who were employed
 14 by Defendants in California as non-exempt, hourly-paid salon stylists, cashiers, sales
 15 associates, or other position assigned cashier duties at any time from August 1, 2016 in
 16 a California retail store location (excluding employees that worked at JCPenney Store
 17 Nos. 0250, 1778, 2648, 2649, 2823, and/or 2937)." SAC ¶ 29. Plaintiffs further allege
 18 that "[t]he membership of the entire class is estimated to be greater than one thousand
 19 (1,000) individuals . . ." *Id.* ¶ 32(a). Accordingly, while Defendants deny that class
 20 treatment is permissible or appropriate, based on the Complaint's allegations, the
 21 proposed class plainly consists of more than 100 members.

22 **B. The Amount Placed in Controversy Exceeds \$5 Million.**

23 19. Although Defendants deny that Plaintiffs' claims have any merit and
 24 disputes that Plaintiffs are entitled to any of the sums sought in the Complaint,

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 26
 27 1 The Notice of Removal "need not contain evidentiary submissions," and Defendants reserve their
 28 right to submit additional evidentiary support in the event that Plaintiffs move for remand. *See*
Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 551 (2014).

1 Defendants aver, for the purposes of meeting the jurisdictional requirements for
 2 removal only, that Plaintiffs' requested monetary recovery exceeds \$5 million.

3 20. Plaintiffs allege in their SAC that "the aggregate amount in controversy
 4 for this class action exceeds five million dollars (\$5,000,000) exclusive of interests and
 5 costs." SAC ¶ 3; *see also* SAC ¶ 83 (seeking "civil penalties, restitution, and
 6 attorneys' fees in excess of five million dollars (\$5,000,000) to the State of California
 7 and aggrieved employees"). As such, Plaintiffs' allegations—if accepted—would
 8 place in excess of \$5 million in controversy, exclusive of interest and costs. *See Lewis*
 9 *v. Verizon Commc 'ns, Inc.*, 627 F.3d 395, 399 (9th Cir. 2010) ("In determining the
 10 amount [in controversy], we first look to the complaint.").

11 21. For the foregoing reasons, this action meets the jurisdictional minimum
 12 amount in controversy. *See Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th
 13 Cir. 2015) ("[A] defendant's notice of removal need include only a plausible
 14 allegation that the amount in controversy exceeds the jurisdictional threshold,' and
 15 need not contain evidentiary submissions.") (quoting *Dart Cherokee*, 135 S. Ct. at
 16 554); *Lewis*, 627 F.3d at 401 ("[O]nce the proponent of federal jurisdiction has
 17 explained *plausibly* how the stakes exceed \$5 million . . . *then the case belongs in*
 18 *federal court unless it is legally impossible for the plaintiff to recover that much.*")
 19 (emphasis added) (*citing Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008)).

20 **C. Minimal Diversity Exists Because Plaintiffs Are Citizens of a Different State
 21 than Defendants**

22 22. The minimum diversity of citizenship criterion under CAFA is met if the
 23 plaintiff or "any member" of the putative class "is a citizen of a State different from
 24 any defendant." 28 U.S.C. § 1332(d)(2)(A).

25 23. Plaintiffs allege that "any one plaintiff is a citizen of a state different from
 26 that of any defendant." SAC ¶ 3.

27 24. Both Plaintiffs are domiciled in California. *See Conway Decl. Ex. CC* at
 28 9:17–23; *Ex. DD* at 12:16–13:3. In addition, Plaintiffs seek to represent a class of

1 “[a]ll persons who were employed by Defendants in California as non-exempt, hourly-
2 paid salon stylists, cashiers, sales associates, or other position assigned cashier duties
3 at any time from August 1, 2016 in a California retail store location (excluding
4 employees that worked at JCPenney Store Nos. 0250, 1778, 2648, 2649, 2823, and/or
5 2937).” SAC ¶ 29. Because the putative class purports to encompass anyone who
6 worked in California, common sense dictates that the putative class includes people
7 who are citizens of California. Accordingly, Defendants aver, for the purposes of
8 removal only, that the putative class includes individuals who are citizens of
9 California.

10 25. Plaintiffs also allege that “Defendants are citizens of Delaware and have
11 their principal place of business in Texas.” SAC ¶ 5; *see also id.* ¶¶ 18–19 (“JCPenney
12 is a Delaware corporation . . . and maintains their corporate headquarters in Plano,
13 Texas.”); Conway Decl. Ex. BB (J. C. Penney Company, Inc. Form 10-Q, dated
14 September 5, 2018) at 1, 5 (stating J. C. Penney Company, Inc. is incorporated in
15 Delaware with principal executive offices in Plano, Texas and that J. C. Penney
16 Corporation is incorporated in Delaware).

17 26. “Under CAFA there is sufficient diversity to establish federal diversity
18 jurisdiction so long as one class member has citizenship diverse from that of one
19 defendant.” *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1276 (9th Cir. 2017).
20 Based on Plaintiffs’ allegations and the foregoing facts, Defendants in good faith
21 allege that Plaintiffs and/or at least one “member” of Plaintiffs’ alleged class that “is a
22 citizen of a State different from any defendant.” 28 U.S.C. 1332(d)(2)(A).

23 27. Because Defendants have met their “initial burden of establishing federal
24 jurisdiction under § 1332(d)(2),” the action is removable. *See Serrano v. 180 Connect,*
25 *Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); 28 U.S.C. § 1441(a) (“Except as otherwise
26 expressly provided by Act of Congress, any civil action brought in a State court of
27 which the district courts of the United States have original jurisdiction, may be
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1 removed by the defendant or the defendants, to the district court of the United States
2 for the district and division embracing the place where such action is pending.”).

3 **IV. THIS COURT HAS JURISDICTION AND REMOVAL IS PROPER**

4 28. Based on the foregoing facts and allegations, this Court has original
5 jurisdiction over this action because:

- 6 (a) this is a civil action that is a class action within the meaning of
7 § 1332(d)(1)(B);
8 (b) this action involves a putative class of more than 100 persons as required
9 by § 1332(d)(5)(B);
10 (c) the amount in controversy exceeds \$5 million, exclusive of interest and
11 costs as required by § 1332(d)(2); and
12 (d) Plaintiff Stephanie Garrido, Plaintiff Jazmin Solano, and/or a member of
13 the putative class is a citizen of a state different from Defendants as
14 required by § 1332(d)(2)(A).

15 29. Accordingly, removal of this action is proper under 28 U.S.C. §§ 1441,
16 1446, and 1453.

17 30. The United States District Court for the Central District of California,
18 Eastern Division, is the appropriate venue for removal pursuant to 28 U.S.C. § 1441(a)
19 because it embraces the place where Plaintiffs originally filed the case, in the Superior
20 Court of Riverside County. *See* 28 U.S.C. § 84(c); 28 U.S.C. § 1441(a).

21 31. In accordance with 28 U.S.C. § 1446(a), true and correct copies of all
22 process, pleadings, and orders from *Garrido et. al v. J. C. Penney Corporation, Inc.*,
23 Case No. RIC 1714926, Superior Court of California, County of Riverside are attached
24 as Exhibits A-AA to the Declaration of Cathy A. Conway filed concurrently herewith.
25 Conway Decl. ¶ 33, Ex. A-AA.

26 32. Upon filing the Notice of Removal, Defendants will furnish written notice
27 to Plaintiffs’ counsel, and will file and serve a copy of this Notice with the Clerk of the
28 Superior Court of Riverside County, pursuant to 28 U.S.C. § 1446(d).

1 WHEREFORE, Defendants hereby remove to the Court the above action
2 pending against it in the Superior Court of California, Riverside County.

3 Dated: September 24, 2018

4 CATHERINE A. CONWAY
5 KATHERINE V.A. SMITH
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7 DUSTIN G. MAY
8 GIBSON, DUNN & CRUTCHER LLP

9
10 By: /s/ Catherine A. Conway
11 Catherine A. Conway

12
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